

REMARKS

Claims 1-24 are pending in the application. The Applicants hereby request further examination and reconsideration of the application in view of these remarks.

Substantive Rejections:

In paragraph 4, the Examiner rejected claims 1-3, 5-13, 15-22, and 24 under 35 U.S.C. § 103(a) as being unpatentable over Moeller'022 (U.S. Patent Application Publication No. 2003/0170022). In paragraph 5, the Examiner rejected claims 4, 14, and 23 under 35 U.S.C. § 103(a) as being unpatentable over Moeller'022 in view of Yonenaga. For the following reasons, the Applicants submit that all claims are allowable over the cited references.

Moeller'022 is a U.S. patent application having a common inventor with the present application. Submitted herewith is a Declaration under 37 CFR 1.132, which establishes that Lothar Moeller (the common inventor) conceived and invented the subject matter disclosed in Moeller'022 that is relied on by the Examiner in the rejection of claims 1-24 of the present application. The Applicants therefore submit that said subject matter of Moeller'022 was derived from Lothar Moeller and, as such, is not the invention by "another." It is thus submitted that Moeller'022 is not a proper prior-art reference, and that the rejections of claims over Moeller'022 should be withdrawn. Thus, the rejections of claims 1-24 under 35 U.S.C. § 103(a) over Moeller'022 have been overcome.

Double Patenting Rejection:

In paragraph 6 of the office action, in reference to MPEP § 804(I)(B)(1), the Examiner contends that the double patenting rejection cannot be withdrawn until a double patenting rejection is made in the co-pending application (Serial No. 10/782,231) and that, because there is no double patenting rejection in that application, the double patenting rejection in the present application is proper. For the following reasons, the Applicants respectfully disagree with this interpretation of MPEP § 804(I)(B)(1).

MPEP § 804(I)(B)(1) contains three paragraphs, each dealing with a different possible situation with regard to co-pending applications. The first paragraph deals with the situation, in which a provisional obviousness-type double patenting (ODP) rejection is the only rejection remaining in one of the two co-pending applications, while the other application is rejectable on other grounds. The second paragraph deals with the situation, in which provisional ODP rejections are the only rejections remaining in both of the two co-pending applications. Finally, the third paragraph deals with the situation, in which there are three co-pending applications containing claims that conflict such that an ODP rejection is made in each application based upon the other two. It appears that, in refusing to withdraw the provisional ODP rejection, the Examiner improperly relies on MPEP § 804(I)(B)(1), second paragraph, whereas the applicable rule is stated in MPEP § 804(I)(B)(1), first paragraph.

Assuming that the substantive rejections have been overcome, the provisional ODP rejection is the only rejection remaining in the present application, while the co-pending application (Serial No. 10/782,231) is being rejected on other grounds (more specifically, under 35 U.S.C. §§ 102 and 103, see the file wrapper). It is submitted that this situation is governed by MPEP § 804(I)(B)(1), first paragraph, and not by MPEP § 804(I)(B)(1), second paragraph, the Examiner's assertions to the contrary notwithstanding.

Since the present application was filed on 12/08/2003 and the co-pending application (Serial No. 10/782,231) was filed on 02/19/2004, the present application is "the earlier filed of the two

pending applications” for the purposes of MPEP § 804(I)(B)(1). In the pertinent part, the rule enunciated by MPEP § 804(I)(B)(1), first paragraph, states:

If a "provisional" nonstatutory obviousness-type double patenting (ODP) rejection is the only rejection remaining in the earlier filed of the two pending applications, while the later-filed application is rejectable on other grounds, the examiner should withdraw that rejection and permit the earlier-filed application to issue as a patent without a terminal disclaimer.

Thus, the command of MPEP § 804(I)(B)(1) is clear: the obviousness-type double patenting rejection in the present application should be withdrawn, which withdrawal is respectfully requested.

In view of the above remarks, the Applicants believe that the pending claims are in condition for allowance. Therefore, the Applicants believe that the entire application is now in condition for allowance, and early and favorable action is respectfully solicited.

Fees

During the pendency of this application, the Commissioner for Patents is hereby authorized to charge payment of any filing fees for presentation of extra claims under 37 CFR 1.16 and any patent application processing fees under 37 CFR 1.17 or credit any overpayment to **Mendelsohn & Associates, P.C. Deposit Account No. 50-0782.**

The Commissioner for Patents is hereby authorized to treat any concurrent or future reply, requiring a petition for extension of time under 37 CFR § 1.136 for its timely submission, as incorporating a petition for extension of time for the appropriate length of time if not submitted with the reply.

Respectfully submitted,

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